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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 542

31415 #2
HOU-IL

N. S. HOUSMAN,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Petition for Writ of Certiorari and Brief In Support Thereof

To the District Court of Appeal of the State of California, First Appellate District, Division Two.

LEO R. FRIEDMAN,
Russ Building,
San Francisco, California,
Attorney for Petitioner.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No.....

N. S. HOUSMAN,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the District Court of Appeal of the State of California, First Appellate District, Division Two.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of N. S. Housman for a writ of certiorari to the District Court of Appeal of the State of California, First Appellate District, Division Two, respectfully shows:

STATEMENT OF THE CASE.

Petitioner, a licensed physician, was indicted, tried and convicted in the Superior Court of the State of California of two charges violating Section 118 of the California Penal Code (perjury), two violations of Section 132 of the Penal Code (offering false evidence) and two violations of Section 134 of the Penal Code (preparing false evidence).

On August 30, 1939, two complaints, numbered respectively 423,409 and 423,410, were filed in the Municipal Court of San Francisco, each charging the petitioner with having violated, on August 30, 1939, Section 1-d of the State Narcotic Act, which provided that any doctor authorized to issue prescriptions for narcotics must keep a record of the name and address of the person to whom issued, the date when issued, the character and quantity of the drug prescribed and the purpose for which such prescription was issued. These two cases were consolidated and tried together in the Municipal Court, before a jury, the trial starting on September 26, 1939, and ending on October 5, 1939, when the jury returned verdicts finding the defendant not guilty. (These consolidated actions will be referred to as "the first Municipal Court trial".)

At the first Municipal Court trial the State relied on petitioner's failure to keep a record of a prescription for narcotics issued to A. E. Black for morphine

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(Note: All page references herein are to the certified Clerk's Transcript (C. T.) and Reporter's Transcript (R. T.) on file in the above court, as the printed record has not as yet been prepared.)

sulphate, (R.T. 43), and a prescription issued to A.R. Brandon for 160 hypodermic tablets of morphine sulphate, grains 40 (R.T. 44), the contention of the State being that as to each of these prescriptions the doctor had kept no record as required by the Narcotic Act.

Petitioner was a witness in his own behalf and offered in evidence two cards, one showing prescriptions for narcotics issued to A. E. Black and the other showing prescriptions issued for narcotics to A. R. Brandon. These cards were marked respectively Defendant's Exhibits L and M in evidence.

(Throughout the trial in the Superior Court these cards were referred to as the "Black case record card" and the "Brandon case record card" and for brevity will be referred to as the "Black card" and the "Brandon card".)

These cards covered the issuance of prescriptions for a great number of months and included the two prescriptions relied on by the State. Petitioner testified at the first Municipal Court trial that each of the entries on these cards was made at or about the time it bore date. As stated above the jury found the defendant not guilty on each charge.

On September 17, 1939, another complaint numbered 425,187, was filed in the Municipal Court charging the defendant with thirty specific violations of Section 1-d of the Narcotic Act. Of these thirty counts, 25 thereof involved prescriptions issued to Mrs. Black and to Brandon and which the State claimed appellant had kept no record of. Of these 25

prescriptions 22 appeared on the Black and Brandon cards, as aforesaid.

(This second Municipal Court charge will be referred to as "the second Municipal Court trial".)

This second Municipal Court action went to trial before a jury on January 10, 1940, and terminated on February 17, 1940, by the jury returning a verdict finding the defendant "not guilty" on 27 of the counts including the 22 counts predicated on the Black and Brandon prescriptions, *records of which appeared on the Black and Brandon cards,* and finding the defendant "guilty" on the three counts *where no record of such three prescriptions appeared on any case record cards of appellant.* At this trial the State offered in evidence many prescriptions written by appellant and again appellant testified as a witness in his own behalf, offered in evidence the Black and Brandon cards, and testified that the entries thereon were made at or about the time they bore date. The State contended that the cards were false, fabricated and antedated and had been prepared by appellant after August 30, 1939. In support of this contention the State offered circumstantial evidence, and an expert on inks and writing, E. O. Heinrich, who testified that such entries were made on the cards at about the time claimed by the State. In rebuttal appellant produced other experts in support of the verity of each card and the entries thereon. The issue as to the verity of each of these cards was presented to the jury by proper instructions of the Municipal Court trial judge

and was argued to the jury by respective counsel. The Municipal Judge instructed the jury as follows:

> "You will further understand that the question in dispute in this case, *whether or not the defendant's records are false*, is not for the expert to determine. *That question is alone for you to determine from all the testimony in the case.*"

Thus, in the second Municipal Court trial, the question was directly in issue as to whether the Black and Brandon cards were true and correct and the entries made thereon at or about the time they bore date, the jury found on this question in favor of appellant by returning the 22 verdicts of not guilty on the same number of counts where the date and narcotic prescriptions appear on the Black and Brandon cards. In other words in the second Municipal Court trial *the jury found, on an issue directly presented, that neither the Black nor the Brandon card was false, fabricated or antedated.*

On November 9, 1939, the present indictment was filed in the Superior Court. (Cl. Tr. 2-26.) Count one of the indictment charged the defendant with committing perjury in the first Municipal Court trial by testifying that an entry on the Brandon card was made on the date indicated on the card. (Cl. Tr. 1-5.)

The second count of the indictment charged defendant with committing perjury at the first Municipal Court trial in testifying that various entries on the Black card were made at or about the time they bore date. (Cl. Tr. 5-11.)

The third count of the indictment charged defendant with offering in evidence as true and genuine, at the first Municipal Court trial, the Black record card knowing that it had been fraudulently altered and antedated. (Cl. Tr. 11-14.)

The fourth count of the indictment charged defendant with having offered in evidence at the first Municipal Court trial, as true and genuine, the Brandon record card knowing the same to have been fraudulently altered and antedated. (Cl. Tr. 14-18.)

The fifth count of the indictment charged defendant with having, between August 18, 1939, and October 3, 1939, prepared a false and antedated record, etc., to wit: the Black card, for the purpose of producing it, etc., as genuine and true at the first Municipal Court trial. (Cl. Tr. 18-21.)

The sixth count charged the defendant with having, between August 18, 1939, and October 3, 1939, prepared a certain false and antedated record, to wit: the Brandon card, for the purpose of offering it as true and genuine in the first Municipal Court trial. (Cl. Tr. 21-25.)

The indictment related solely to the proceedings had at the first Municipal Court trial. No offense is alleged to have been committed at the second Municipal Court trial.

Before the trial of petitioner on the charges contained in the indictment, the second Municipal Court trial had been completed, the judgments and verdicts of not guilty rendered therein had become final and

the question, as between the State and petitioner, of the truth and verity of the Black and Brandon cards had been determined by the jury therein.

From the inception of the instant proceedings in the state courts, petitioner urged that the doctrine of *res judicata,* as embodied in Sections 1908 and 1911 of the California Code of Civil Procedure and as it inherently exists in our jurisprudence, was fully applicable to criminal prosecutions including perjury and preparing and offering false evidence. The respondent court held the doctrine to be applicable to criminal cases but held that perjury cases were an exception to this well established principle of jurisprudence.

The California State Narcotic Act, under which the prosecutions were had in the *first* Municipal Court trial, was repealed in its entirety on September 19, 1939 when the Health and Safety Code was adopted. (Cal. Stats. 1939, Ch. 60, p. 483.) This repeal date was prior to the trial and acquittal in the *first* Municipal Court case. Petitioner contended that the first municipal trial was invalid as following the repeal of the Narcotic Act and that no perjury or kindred offense could be committed in a void trial. The Health and Safety Code contained a purported saving clause, Section 4, which petitioner contended was in violation of the due process and equal protection clauses of the Fourteenth Amendment. The respondent court upheld the savings clause and refused to decide the constitutional question raised.

STATEMENT OF THE CONSTITUTIONAL QUESTIONS INVOLVED.

The constitutional questions involved are as follows:

1. As the doctrine of *res judicata* is a fundamental principle of justice (*United States v. Oppenheimer*, 242 U. S. 85, 61 L. Ed. 161) applicable to all cases, criminal and civil alike, does not the decision of respondent court, holding such doctrine inapplicable to prosecutions for perjury, run counter to the Fourteenth Amendment guaranteeing due process of law and the equal protection of the laws?

2. The purported saving clause of the California Health and Safety Code (Cal. Stats. 1939, Ch. 60, p. 483) attempts to save "Any action or proceeding commenced before this code takes effect." As this section makes an arbitrary distinction between those who violated the State Narcotic Act before September 19, 1939, by subjecting to prosecution and punishment those against whom an accusation had been filed prior to that date and giving immunity to those against whom no such accusation had been filed, is not this purported saving clause void as being in violation of the equal protection of the laws clause of the Fourteenth Amendment?

JURISDICTIONAL STATEMENTS.

(a) The jurisdiction of this court is invoked under section 237(b) of the Judicial Code of the United States.

(b) The decision and judgment of the respondent District Court of Appeal was rendered on May 2,

1941. A petition for hearing by the Supreme Court of the State of California was denied on May 29, 1941.

(c) The respondent District Court of Appeal is the highest court of the State of California in which a decision could be had in the instant case respecting the questions involved. (Cal. Const., Art. VI, Sec. 4b.)

(d) The first statute of California, the validity of which is involved, is Section 4 of the California Health and Safety Code and will be found in Cal. Stats. 1939, Ch. 60, p. 483, and reads as follows:

> "Any action or proceeding commenced before this code takes effect, and any right accrued, is not affected by this code, but all procedure thereafter taken therein shall conform to the provisions of this code as far as possible."

The second statute of California, the validity of which, as construed by respondent court, is involved is Section 1908 of the California Code of Civil Procedure, reading, in part, as follows:

> "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: * * * 2. In other cases the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties * * *."

(e) The grounds upon which it is contended that the questions involved are substantial.

Neither the crime of perjury nor that of offering false evidence can occur except in a valid judicial proceeding. A trial held under a statute that has been repealed is not a valid proceeding. The Health and Safety Code repealed the State Narcotic Act prior to the first municipal court trial. The purported saving clause was inoperative as calling for an unequal application of the law by unjustly discriminating between those who had violated the repealed Narcotic Act by allowing prosecutions to be continued where an accusation had been filed before such repeal and prohibiting such prosecutions where no accusation had been so filed. A denial of the equal protection and equal application of the laws is in itself a substantial matter. The failure of the respondent court to pass upon the constitutional question involved is likewise a matter of substance. For the respondent court to so construe the saving clause as to make it operate in a manner directly opposed to its express terms is to deprive petitioner and all others in like circumstances of the benefit of laws as enacted resulting in the deprivation of liberty without due process of law.

The doctrine of *res judicata* is a fundamental principle of justice. Any action by a state, which deprives an accused of the benefit of a fundamental principle of justice or which runs counter to our conceptions of those fundamental principles of justice which lie at the base of our institutions, is a denial of due process of law. Where such denial results in the deprivation of liberty it presents a substantial question of both law and justice. Fundamental principles

of justice must operate uniformly and without exception. To hold that such fundamental principle applies in all cases save one is to make an unjust discrimination resulting in the denial of due process and the equal application of the laws.

(f) The question of the repeal of the Narcotic Act and unconstitutionality of the purported saving clause in the Health and Safety Code was first raised in respondent court by petitioner's briefs. That such was the case and the manner in which respondent court passed on the questions appears from the following portion of the court's decision:

> "The appellant next complains that because of the repeal of the State Narcotic Act effective September 19, 1939, his trial in the municipal court occurring after that date was a nullity for perjury committed during the course of the former trial. He bases his argument on the contention that when the legislature adopted the Health and Safety Code effective September 19, 1939, (Statutes 1939, p. 483) it failed to provide a saving clause covering offenses committed under the former act. In this the appellant is in error. Section 2 of the Health and Safety Code reads as follows: 'The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations, and not as new enactments.' Section 4 reads as follows: 'Any action or proceeding commenced before this code takes effect, and any right accrued, is not affected by this code, but all procedure thereafter taken therein shall conform to

the provisions of this code as far as possible.' If this language is insufficient to disclose the legislative intent to effect a mere codification and clarification of the existing statutes without affecting the rights and obligations under those statutes, that legislative intent must be inferred from the fact that in reference to the subject matter here involved the new statute was a mere restatement of the provisions of the former. This subject is fully discussed in the recent opinion of *Sobey v. Molony,* 40 Cal. App. (2d) 381, in which numerous cases are cited. But the appellant argues that section 4 of the Health and Safety Code is unconstitutional because perchance one might have violated the provisions of the State Narcotic Act prior to the effective date of the codifying act with no proceedings taken against him before that date, and hence the section would discriminate favorably to him and against those in the same position as to whom proceedings had been commenced before that date. We need not discuss this question in its constitutional phases as the section could be disregarded entirely and the same result would follow because of the settled rule that, independent of the saving clause, a person may lawfully be prosecuted under a reenacted or codified statute for a crime committed prior to the date of the codification."

The manner of raising the question *res judicata* and the stages in the proceeding where raised are as follows:

Immediately upon the start of the trial the following stipulations were entered into between petitioner and the State:

1. That the Black and Brandon cards were offered in evidence at the *second* Municipal Court trial by petitioner, that the State claimed at that trial that they had been fabricated and antedated by petitioner and that such claim was one of the matters argued and submitted to the jury. (R. T. 9.)

2. That at the second Municipal Court trial the State offered expert testimony in support of its claim that the cards were fabricated and additions made thereto and that the State announced to the jury at the trial that such was the State's theory of the case. (R. T. 9.)

3. That the two cards as set out in the indictment were before the jury in the second Municipal Court trial. (R. T. 10.)

Following the empanelment of the jury petitioner filed a written motion to dismiss each of the counts set forth in the indictment on the ground that the verity of the Black and Brandon cards had been conclusively adjudicated, as between the State and appellant, by the verdicts of the jury in the second Municipal Court action finding the defendant not guilty of the twenty-two counts of the complaint wherein the record of the narcotic prescriptions issued appeared on the Black and Brandon cards; that such adjudication was *res judicata* of the issue involved and constituted a bar to the instant action. The motion was made on the judgment roll, records, papers, testimony offered and received and the instructions given by the court to the jury in the second Municipal

Court trial. (Cl. Tr. 62 to 66.) The court denied this motion.

Following the prosecutor's opening statement to the jury petitioner moved the court for an order suppressing and excluding any evidence on the part of the State tending to prove or offered for the purpose of proving the antedated character of either the Black or Brandon cards or as tending to prove the falsity of any entry on said cards, also to suppress any evidence to be given by the State's witness Madden relative to the taking or the making of any list of prescriptions at Lewin's Drugstore and the delivery of said list to Attorney Taaffe, also to suppress the testimony of the State's witness Creighton and the State's witness Taaffe dealing with the same matters and things. Said motion was made upon the ground that the correctness and verity of the Black and Brandon cards had been conclusively established as between appellant and the State in the second Municipal Court trial as aforesaid. (R. T. 28-30.) Upon the making of this motion it was stipulated that, in considering the propriety thereof, all the stipulations entered into be considered as part of the present motion. (R. T. 30, 31.)

It was further stipulated that the judgment rolls in the first and second Municipal Court trials, the transcript of the testimony in each of those trials and the charge to the jury in the second trial be considered as part of the motion and the opposition thereto. (R. T. 31 to 33.) The court denied this motion.

Throughout the trial petitioner constantly objected to the admission of any testimony or evidence on the

part of the State tending to prove that either of the cards was false or antedated. The trial court denied each of these objections. (R. T. 66, 67, 68, 74, 194, 196, 281, 312, 313, 335.)

At the conclusion of the State's case petitioner moved the court for an order striking out all testimony—specifying it—tending to prove the alleged false and fabricated character of the cards. The court denied such motion. (R. T. 409 to 413.)

The trial court refused to instruct the jury, as requested by petitioner (C. T. 102), as to the conclusive effect of a prior judgment as announced by Section 1908 of the Code of Civil Procedure, heretofore quoted.

The trial court also refused to instruct, as requested by petitioner in his requested instructions No. 36, 37 and 38 (C. T. 103, 104, 105-107) that the verity of the Black and Brandon cards having been submitted to the jury in the second municipal court trial and that jury having found them to be true and correct, that such adjudication became and was conclusive evidence that the cards were true and correct and not false or fabricated.

On appeal to the respondent court the question was directly raised that the doctrine of *res judicata* was one of equal and universal application and applied in perjury cases and all other criminal prosecutions without exception; that Section 1908 of the Code of Civil Procedure, embodying the doctrine, contained no exceptions.

The respondent court conceded the applicability to criminal cases of the doctrine but held that there was an exception in cases of perjury and that the doctrine did not apply in such cases. The portion of the decision dealing with this matter follows:

> "Though there is some conflict in the authorities upon the question of whether the doctrine of res judicata applies in a criminal proceeding of this nature the great weight of authority is that is has no application. One of the leading cases adopting the majority view is *People v. Niles,* (Ill.) 133 N. E. 252. In that case the appellant had been indicted jointly with another for the larceny of and receiving as stolen property an automobile. The codefendant pleaded guilty and upon his favorable testimony and that of the appellant the latter was found not guilty. Thereafter he was indicted for perjury because of the testimony so given. On appeal the supreme court of Illinois said that the question presented for decision was: 'Can a person acquitted by a jury of an offense of which he denied his guilt as a witness in his own behalf be afterwards prosecuted for perjury predicated upon testimony given by him upon the former trial, where a conviction of the charge of perjury necessarily imports a contradiction of the verdict of not guilty in the former trial?' In answering the question in the affirmative the court said: 'Justice cannot be administered through a system of courts unless there can be some assurance that the finding of the court is based upon testimony truthfully given. Any rule which tends to encourage the giving of false testimony threatens the peaceable

and commendable settlement of controversies by the courts. The general proposition that one can escape punishment for perjury because he succeeded in inducing a jury to credit his false testimony is supported neither by authority nor by reason. If he could, then it follows that the law encourages parties—particularly defendants in criminal cases—to perjure themselves. We must declare that the law is guilty of no such folly. An accused's immunity from punishment for crime must not be made to depend upon the accomplishment of his acquittal in one prosecution by committing the crime for which he claims immunity. It is furthermore the policy of the law that judicial proceedings and judgments shall be fair and free from fraud, and that litigants and parties be encouraged, when sworn as witnesses, to tell the truth, and that they be punished if they do not. The authorities seem now to be unanimous in holding that an acquittal of one charged with crime is no bar to a prosecution for perjury for false testimony given by him at the trial. (Citing numerous cases).'

"In *Jay vs. State*, (Ala.) 37 So. 137, 139, the Alabama court clearly states the reason for the majority rule in the following language: 'The doctrine of res judicata springs out of and is founded upon the principle of estoppel. It rests upon the principle of public policy that there should be an end to litigation—the maxim is, "Interest reipublicae ut sit finis litium." Keeping in view the basic principle and underlying reason —public policy—it is obvious that while public policy on the one hand demands an end of litigation, and hence puts forward the doctrine of res

judicata, yet, on the other, it is manifest that every interest of public policy demands that perjury be not shielded by artificial refinements and narrow technicalities, for perjury strikes at the very administration of the law and holds the courts up to contempt if they allow the perjurer to go unwhipt of justice. In other words, while public policy on the one hand creates the doctrine of res judicata, it also, on the other, requires that perjurers be brought to trial. It would be a monstrous doctrine to hold that a person could go into a court of justice and by perjured testimony secure an acquittal, and because acquitted he could not be tried for his perjury; this would be putting a premium upon perjury and allowing a scoundrel to take advantage of his own wrong. Public policy does not guaranty immunity to criminals, and that is just what we are asked to do in extending the doctrine of res judicata to perjury.'

"It would serve no purpose to cite further cases in support of the majority rule or to attempt to analyze those cited by appellant from the minority. Reference may be had to 37 *A. L. R.* 1290 et seq; 15 *Am. Jur.* p. 45."

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Your petitioner verily believes that he has been deprived of his liberty in violation of the Fourteenth Amendment. The decision of the respondent court is in disregard of the prior decisions of this Court as to the applicability of *res judicata* to all criminal cases

and denies to petitioner a fundamental right that lies at the very base of our democratic institutions and this Court's conception of justice. The refusal to consider the invalidity of the saving clause in the Health and Safety Code denies to petitioner due process of law. To this we add the reasons heretofore advanced as to the substantial character of the questions involved. The writ should issue to correct these errors and restore petitioner's constitutional rights and to prevent the doctrines so erroneously announced by respondent court from becoming binding precedent.

Wherefore, petitioner prays that this Honorable Court issue a writ of certiorari to the District Court of Appeal of the State of California, First Appellate District, Division Two, to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated San Francisco,
August 21, 1941.

LEO R. FRIEDMAN,
Attorney for Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for petitioner in the above cause and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco,
August 21, 1941.

LEO R. FRIEDMAN,
Attorney for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. .....

N. S. HOUSMAN,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Brief in Support of Petition for Writ of Certiorari

DATE OF JUDGMENT OF TRIAL COURT.

The judgment of the trial court was rendered on June 13, 1940. (C. T. 129.)

(Note: All italics appearing in this brief, unless otherwise noted, have been supplied by the writer.)

OPINION OF THE DISTRICT COURT OF APPEAL.

The opinion of the respondent District Court of Appeal was rendered and filed on May 2, 1941, reported in the California advance decisions in 44 A. C. A. 687, and became final on May 29, 1941, upon the order of the Supreme Court of California denying a hearing by that court.

JURISDICTION AND STATEMENT OF FACTS.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code of the United States; U. S. C. A. Title 28, Sec. 344, subdivision b.

The grounds on which the jurisdiction of this Court attaches and the statement of the facts, pursuant to Rule 12 of this Court, are fully set forth in the petition filed herein.

SPECIFICATION OF ERRORS

1. Respondent court erred in holding that Section 4 of the California Health & Safety Code (Cal. Stats. 1939, p. 483) was valid and saved prosecutions theretofore commenced under the repealed Section 1-d of the State Narcotic Act. (Cal. Stats. 1929, Ch. 216, p. 380, as amended by Stats. 1933, Ch. 216, p. 380.) Said purported saving clause in the Health & Safety Code is void as being in violation of the equal protection of the laws clause of the Fourteenth Amendment and also of the due process clause of said Amendment, as

making an arbitrary and unjust discrimination between people of the same class who had violated the State Narcotic Act, by subjecting those to prosecution and punishment against whom an accusation had been filed prior to September 19, 1939, and giving immunity to those against whom no such accusation had been filed prior to said date. The respondent court recognized but failed to pass upon this constitutional question.

2. Respondent court denied to petitioner the rights guaranteed to him under the due process clause and equal protection of the laws clause of the Fourteenth Amendment by holding that the great principle of justice embodied in the doctrine of *res judicata,* while applicable to criminal cases, was not available to petitioner in a prosecution against him for perjury.

ARGUMENT.

I.

THE PURPORTED SAVING CLAUSE OF THE CALIFORNIA HEALTH AND SAFETY CODE VIOLATES THE FOURTEENTH AMENDMENT.

The importance of this point appears from the following facts: The charges, in the present indictment, of which petitioner was convicted, arose out of a trial in the Municipal Court of San Francisco, based on violations of Section 1-d of the California Narcotic Act. He was accused of the offenses of perjury, offering and preparing false evidence at this *first trial*

which was held from September 26 to October 5, 1939. The Health and Safety Code became effective on September 19, 1939, and contained, as hereafter pointed out, a repeal of the entire State Narcotic Act. If there was no valid saving clause in the Health and Safety Code, preserving prosecutions for violation of the repealed Narcotic Act, then there could not have been any crime of perjury or preparing or offering false evidence at the purported trial for violating the Narcotic Act, as said trial occurred after the effective date of the repeal of such Act.

(a) Neither perjury nor offering false evidence can be committed in a trial over which the court has no jurisdiction. Both a valid judicial trial and a valid issue must exist before either such offense can be committed.

Perjury cannot be charged on a false oath in a proceeding before a court which had no jurisdiction to try the offense which was the subject of that proceeding.

Before the giving of any evidence can constitute perjury or the offense of offering false evidence be committed at a trial, it is necessary that the proceeding in which either such act occurs be a "judicial trial", *i. e.*, a trial which the court had jurisdiction to conduct. It is only in such a trial that a "valid issue" can be involved and it is only where a valid issue is involved that any evidence, oral or documentary, can be deemed material. It is only material evidence that can form the basis for either such offenses.

The general rule is correctly announced in Corpus Juris as follows:

> "In the absence of some statute changing or modifying the rule, it is well settled that to constitute the crime of perjury or false swearing it is essential that the false statement be made in a proceeding or with respect to a matter within the jurisdiction of the court, tribunal, or officer before or by whom the matter may be considered. It must further appear * * * that the tribunal or officer was competent to act."
>
> 48 *Corpus Juris,* Sec. 61, p. 847.

In *Wharton's Crim. Law* (11th Ed.), Vol. II, Sec. 1536, the author states:

> "A suit which is actually void and null from want of jurisdiction or other incurable defect is not one in which perjury can be committed. Thus it is not perjury to swear falsely in a discontinued or abated suit."

California Jurisprudence states the rule as follows:

> "A charge of perjury may be predicated upon an oath taken in the course of a judicial proceeding, *provided the court had jurisdiction."*
>
> 20 *Cal. Jur.* p. 1008, Sec. 5.

> "As was the rule at common law, to constitute perjury under the code it must appear that the matter falsely sworn to was material to a valid issue in the proceeding in which the statement was made. *Thus matter sworn to before an officer or tribunal not having jurisdiction of the proceed-*

*ing in which the oath is taken * * * cannot furnish a foundation for a charge of perjury."*

20 *Cal. Jur.* p. 1012, Sec. 8.

The California cases have invariably followed the foregoing rule.

In re Clark, 54 Cal. App. 507;
People v. Howard, 111 Cal. 655, 658;
People v. Teixeira, 59 Cal. App. 598.

The repeal of a statute, without any valid saving clause, divests the courts of any jurisdiction to try one for a violation thereof committed before such repeal. The effects of such repeal are: (a) If no accusation, complaint, etc. has been filed, none can be filed; (b) if a complaint has been filed, no trial can be had thereon; (c) if a trial has been had and defendant found guilty, no judgment can be pronounced. In other words, *such repeal of a criminal statute divests the court of jurisdiction at the very point reached in the proceedings at the time of the repeal.*

> "* * * it may be regarded as an established rule that the repeal of a penal statute without any saving clause has the effect to deprive the court in which any prosecution under the statute is pending of all power to proceed further in the matter. 'The repeal of a statute puts an end to all prosecutions under the statute repealed and to all proceedings growing out of it pending at the time of the repeal.' (citing authorities.) * * * *The proceeding is arrested at the very point where it is at the date of the repeal;* if before indictment

no indictment can be found; if after indictment, and before trial, no conviction can be had; if after conviction and before judgment, no judgment can be rendered. * * * If, during the interim, the legislature repeals the statute under which the prosecution is had it operates as a discharge of the defendant."

Spears v. County of Modoc, 101 Cal. 303, 305.

See also

Harkelroad v. Commonwealth (Ky.), 269 S. W. 724.

Appellant was charged, on August 30, 1939, with violating the State Narcotic Act. On September 19, 1939, the Narcotic Act was repealed. As we will next point out, there was no valid saving clause that operated to keep alive prosecutions for offenses committed under the Narcotic Act. It follows, that on such repeal the jurisdiction of the Municipal Court to proceed with the trial of such charges ceased to exist. As the Municipal Court had no jurisdiction to conduct such trial no evidence given thereat could be perjury nor the introduction of fabricated records an offense.

(b) The State Narcotic Act was repealed on September 19, 1939.

The State Narcotic Act, under which the two Municipal Court prosecutions against appellant were based, was enacted in 1929 (Stats. 1929, Ch. 216, p. 380), and was thereafter amended at each legislative session to and including that of 1937.

The Health and Safety Code was approved on April 7, 1939, and went into effect on September 19, 1939.

(Stats. 1939, Ch. 60, p. 483.) Sec. 40002 of the Health and Safety Code reads in part as follows:

> "40002. General Laws. The following acts and portions of acts, together with all acts amendatory thereof and supplementary thereto, are hereby repealed: * * * 1929: 216: 380 All."

Thus on September 19, 1939, the State Narcotic Act was repealed in its entirety and all violations thereof ceased to be a matter of criminal prosecution or trial, unless there was a valid saving clause allowing such prosecutions to be thereafter conducted.

(c) The saving general clause contained in Section 329, Political Code, does not apply to misdemeanors triable in the Municipal Court.

Section 329 of the California Political Code, since its last amendment in 1881, reads as follows:

> "The repeal of any law creating a criminal offense does not constitute a bar to the *indictment or information* and punishment of an act already committed in violation of the law so repealed, unless the intention to bar *such indictment or information* and punishment is expressly declared in the repealing act."

The foregoing section does not apply to misdemeanors which are prosecuted by the filing of a *complaint* in a court inferior to the superior court.

> "The words 'indictment' and 'information' as used in the criminal laws of this as well as other jurisdictions have acquired and been accorded a very precise definition. They have been applied to

proceedings for the prosecution of felonies in courts of record and have never been given application to mere misdemeanors, the prosecution of which is initiated by the filing of complaints in the lower tribunals * * *"

In re Page, 214 Cal. 350, 354.

(d) The purported saving clause in Section 4 of the Health and Safety Code is unconstitutional and void.

When the legislature enacted the Health and Safety Code, it attempted to put a saving clause therein reading as follows:

> "Any action or proceeding commenced before this code takes effect, and any right accrued, is not affected by this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible."
>
> *Health & Safety Code*, Section 4.

So far as pertinent to this case, the foregoing section provides two different things, viz.:

(a) If a person has committed a misdemeanor by violating the State Narcotic Act and *a complaint was filed against him before September 19, 1939*, then the prosecution for such misdemeanor can be carried on through trial and judgment after the repeal of the Narcotic Act became effective; but

(b) If another person has also committed the same violation of the State Narcotic Act and *no complaint was filed against him before September 19, 1939*, then such person cannot be prosecuted for having committed such misdemeanor.

In other words, if fifty people, all standing in the same relation to the law, all pursuing the same calling, should all have committed the misdemeanor of not keeping the records prescribed by Section 1-d of the Narcotic Act and, prior to September 19, 1939, complaints had been filed against 25 of the people and no complaints had been filed against the others, then the latter 25 would be pardoned their transgressions and could not be prosecuted therefor while the former 25 would be subject to prosecution and punishment.

The purported saving clause therefore is in direct violation of the two clauses of Section 1 of the XIV Amendment to the Constitution of the United States, providing: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

We freely concede that the foregoing constitutional provisions do not require the legislature, in every case, to make our laws apply to all persons within our state boundaries. We know that the legislature, in enacting laws, can make classifications of the people; but such right cannot be arbitrarily exercised. The right of the legislature to so classify the people can only be exercised where there is some natural, constitutional or intrinsic distinction between those chosen as the subject of any legislation and those not affected thereby. When such a lawful classification has been made the legislature cannot go further and again divide the class selected into arbitrary

divisions and confer benefits on some and cast burdens on others. Where the people of the selected class all occupy the same position and stand in the same light before the law, all of such people must be treated identically the same by the law.

The foregoing principles have been judicially announced time and again.

> "The legislature may, without violating the constitutional provision above quoted, classify subjects either of regulation or of procedure and enact laws applicable to all within the same class, *provided of course, that such laws apply 'equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction'* and do not confer 'particular disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.' (*City of Pasadena v. Stimson,* 91 Cal. 238, 251 [27 Pac. 604, 607].)"
>
> *City of Los Angeles v. Oliver,* 102 Cal. App. 299, 320.

"And, furthermore, lest by such enactments, the constitutional inhibition against, special legislation may be violated, it is the rule that, *in the passage of laws designed to operate upon a particular class only, there must be no arbitrary discriminations between parties standing in the same relation to the subject of such law,* and that if, by such laws, discriminations are made, then the legislation will fall under the force of the consti-

tutional mandates against special enactments. (*Ex parte King,* 157 Cal. 161 [106 Pac. 578], and cases therein cited.) And in that case it is further said: 'If it [the law] operates uniformly upon all members of such class, it necessarily has the 'uniform operation' required by Section 11 of article I of the constitution."

City of Sacramento v. Swanston, 29 Cal. App. 212, 218.

The purpose and effect of the Fourteenth Amendment has been announced by this Court as follows:

" 'The question of constitutional law to which we have referred (the equal protection of the laws) cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But, as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. "The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law." The state has

undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial of persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void.' "

Dobbins v. Los Angeles, 195 U. S. 223, 237, 49 L. Ed. 169, 175.

"The 14th Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoilation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy properties; that they should have like access to the courts of the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or

higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

Barbier v. Connolly, 113 U. S. 27, 31, 28 L. Ed. 923, 924;

Magoun v. Illinois Bank, 170 U. S. 283, 293, 42 L. Ed. 1037, 1042.

Let us pause and apply the foregoing principles to the facts in issue.

Section 1-d of the State Narcotic Act, before its repeal, provided that "Every person authorized by law to issue a prescription or administer or dispense narcotic drugs" should keep a record of the address of the person to whom issued or dispensed, the date when issued, etc. This record had to be kept for two years. Violation of its terms was a misdemeanor.

Every dispenser of narcotics and every doctor who writes prescriptions therefor occupies exactly the same place in relation to the law. If several fail to keep the record prescribed, each is equally but no more guilty than the other. The duty resting on each is the same. The wrong doing by each is equal. If one should be punished all should be punished. If some are granted immunity, all should be granted immunity.

Under the purported saving clause no such equality can be found. An arbitrary distinction is made, not based on any natural, intrinsic or constitutional difference, between those against whom complaints have been filed and those who have not been complained

against. The provisions of the law operate with full vigor against the first and give complete immunity to the second class.

The purported saving clause therefore violates the Fourteenth Amendment and is void.

(e) The reasons given for the validity of the saving clause, by respondent court, are erroneous.

The respondent court, declining to pass on the constitutional question raised, upheld the continuation of prosecutions based on the repealed Narcotic Act by resort to Section 2 of the Health and Safety Code, reading as follows:

> "The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations, and not as new enactments." (Cal. Stats. 1939, Ch. 60, p. 483).

There is no provision of the Health and Safety Code which is substantially the same as Section 1-d of the repealed Narcotic Act.

Section 1-d of the Narcotic Act was added by Cal. Stats. 1933, Ch. 216, p. 380. This amendatory Act was expressly repealed by Section 40002 of the Health and Safety Code, quoted above.

Section 1-d of the Narcotic Law read as follows:

> "Every person authorized by law to issue a prescription or administer or dispense narcotic drugs as mentioned in this act shall preserve for

a period of not less than two years a record of the name and address of the person to whom, the date when, the character and quantity of the drug prescribed, or administered or dispensed, and the purpose for which each prescription was issued * * *"

The only provision of the Health and Safety Code involving the same matter is Section 11225, which reads:

"Every person who issues a prescription, or administers or dispenses a narcotic shall make a record that, as to the transaction, shows *all* the following: (a) The name and address of the patient. (b) The date. (c) The character and quantity of narcotics involved. (d) *The pathology* and purpose for which the prescription is issued * * *"

Thus, the Health and Safety Code provision is not substantially the same as the old Section 1-d of the Narcotic Act. It adds a new element to the offense, viz: the pathology. A doctor who prescribed narcotics and kept a record of everything required by the Narcotic Act would violate the Health and Safety Code, as under the former law he did not have to include the pathology of the patient while under the new law the failure to include such pathology would render the doctor guilty of a misdemeanor.

The reasoning of respondent court is erroneous. The offenses defined in the first and second act are composed of different elements and, therefore, one is not a substantial re-enactment of the other.

Where a question under the Federal Constitution is involved, this court is not bound by the construction of a state statute by a state court but can construe such statute as it should be construed in conformity to law and justice. (See: *Yick Wo v. Hopkins,* 118 U. S. 356, 366; 30 L. Ed. 220, 225.)

II.

THE HOLDING THAT THE DOCTRINE OF RES JUDICATA HAS NO APPLICATION TO PROSECUTIONS FOR PERJURY, DENIES RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Petitioner was tried and acquitted in the first municipal court trial, at which he offered in evidence the Black and Brandon cards as proof that he kept the records required by the Narcotic Act. New charges were filed against him for failure to keep such records and at this trial he again offered in evidence the *same* cards and testified that the entries thereon were true and correct. At this second municipal court trial the verity of the two cards was directly in issue, expert testimony was offered by both sides, the court instructed the jury that the question for it to determine was the verity of these cards, and they found the cards to be true and correct, not false or fabricated, by acquitting the petitioner. Petitioner was then tried and convicted of perjury and offering false evidence, at the *first* municipal court trial, the perjury consisting in his testimony that the entries on the

cards were correct and the offering of false evidence being the offering of the cards.

Before the trial of the perjury and kindred offenses, the question of the verity of the two cards had been conclusively determined, between petitioner and the State of California, in the second municipal court trial. Throughout the felony trial, petitioner constantly maintained that the issue was *res judicata* and that the verdicts in the second municipal court trial were conclusive evidence, *i.e.* evidence that the law did not permit to be contradicted, as to the verity of the cards. Of course, if the cards were true and correct petitioner's testimony relative thereto was also true and correct.

The respondent court held that while *res judicata* applied to criminal cases it did not apply to prosecutions for perjury. This holding denied to petitioner due process of law and equal operation of the laws as guaranteed to him under the Fourteenth Amendment.

No question is raised in the decision, nor was it raised by the State, as to the applicability of the doctrine of *res judicata* to criminal cases. That such is the general rule has been repeatedly stated by this and the California courts. We merely cite the cases so holding:

Coffey v. United States, 116 U. S. 436; 29 L. Ed. 684;

Frank v. Mangum, 237 U. S. 309, 333; 59 L. Ed. 969, 983;

People v. Frank, 28 Cal. 507, 515;
People v. Mojado, 22 Cal. App. (2d) 323;
People v. Ashrawy, 130 Cal. App. 145;
People v. Kovacevich, 19 Cal. App. (2d) 335.

The lower court makes an exception to the foregoing general rule and holds that *res judicata* has no application to prosecutions for perjury. In so doing the lower court makes no distinction between the following cases:

(1) Where the judgment of acquittal in the very trial in which the perjury is alleged to have occurred is offered as *res judicata* of the truth of the accused's testimony, and (2) Where an accused is first prosecuted for not keeping records and at such trial he is acquitted on his production of records and his testimony that they are true and correct. Following such trial he is again charged with not keeping records, he again offers the *same records* and testifies that they are true and correct. The prosecution attacks the verity of the offered records, produces experts to testify as to the falsity and fabrication, contrary evidence is introduced by the defense, the issue of the verity of the records submitted by the court to the jury for determination, the jury acquits the defendant thus finding the records to be true and correct. Following this second trial, the defendant is prosecuted for perjury and offering false evidence (the records) *at the first trial,* he offers the acquittals at *the second trial* as being *res judicata* on the question of the verity

of the records and *does not rely on the acquittal in the first trial.*

Manifestly a clear distinction exists between the two foregoing cases. Conceding, for argument's sake, that where a defendant procures his acquittal on perjured testimony, he cannot rely on the acquittal as a defense to the perjury committed in the self-same trial, it being against public policy to allow the defendant to profit by his own wrong; nevertheless a different rule must prevail where the very issue of the truth of such testimony (or verity of such physical evidence) is directly litigated, submitted to a jury and determined in favor of the defendant *at a trial occurring subsequent to the one in which the perjury is alleged to have been committed and before the trial for such perjury.*

The lower court cites no case holding that *res judicata* does not fully operate in the latter of the above cases.

Every case cited by the respondent court involved a state of facts where the defendant relied on the acquittal procured in the very trial wherein the claimed perjury occurred.

The conclusive effect of a prior judgment between the same parties has been stated by this court in *Coffey v. United States*, 116 U. S. 436, 29 L. Ed. 684:

> "This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory

punishment denounced as a consequence of the existence of the facts. This is a necessary result of the rules laid down in unanimous opinion of the Judges in the case of *Rex v. Duchess of Kingston,* 20 Howell St. Tr. 355, 538, and which were formulated thus: the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea a bar, or as evidence conclusive, between the same parties, upon the matter directly in question in another court; and the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. In the present case, the court is the same court, and had jurisdiction; and the judgment was directly on the point now involved and between the same parties."

In *Frank v. Mangum,* 237 U. S. 309, 333, 59 L. Ed. 969, 983, the Supreme Court, in a criminal cause, again stated the rule:

> "It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and determined by a court of competent jurisdiction cannot afterwards be disputed between the parties"

And such has always been the rule in California:

Estate of Clark, 190 Cal. 354, 360;
Todhunter v. Smith, 219 Cal. 690, 695;
Sutphin v. Speik, 15 Cal. (2d) 195, 201.

In fact the *res judicata* doctrine has been incorporated in the statute law of California wherein it is declared such prior adjudication is *conclusive evidence* as to the fact adjudicated.

Section 1908 of the California Code of Civil Procedure provides:

> "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: * * * 2. In other cases, the judgment or order is, in respect to the matter directly adjudged, *conclusive* between the parties * * *"

Section 1837 of the same Code of Civil Procedure reads:

> "Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it."

The holding of respondent court thus places a construction, for the first time, upon the foregoing statutes whereby the equal operation and protection thereof are denied to those persons who may be prosecuted for perjury.

The doctrine of *res judicata* is one of those fundamental principles of justice which the Fourteenth Amendment protects from any deprivation thereof by state action.

The character of this doctrine has been announced by this court in the following cases to be: "*A fundamental principle of justice.*"

United States v. Oppenheimer, 242 U. S. 85, 88; 61 L. Ed. 161, 164;

Collins v. Loisel, 262 U. S. 426, 430; 67 L. Ed. 1063, 1064.

In the most recent decisions of this court it has unequivocally been held that any state action denying an accused in a criminal case any fundamental principles of justice, constitutes a denial of due process of law as embraced within the Fourteenth Amendment.

> "The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions' (Hebert v. Louisiana, 272 U. S. 312, 316 71 L. ed. 270, 272, 48 A. L. R. 1102, 47 S. Ct. 103), is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment * * *"

Powell v. Alabama, 287 U. S. 45, 67; 77 L. Ed. 158, 169.

To the same effect are the cases of:

Mooney v. Holohan, 294 U. S. 103; 79 L. Ed. 791;

Brown v. Mississippi, 297 U. S. 278; 80 L. Ed. 682;

Chambers v. Florida, 309 U. S. 227; 84 L. Ed. 716.

Res judicata is a doctrine that falls within the classification of "fundamental principles of justice." It is, therefore, a principle protected by the Fourteenth Amendment. A denial of this right constitutes state action contrary to the constitutional provision and renders void any judgment of conviction based upon the denial of such right.

We have argued this matter upon the assumption that the respondent court's conclusion is sound that the doctrine does not apply to those cases of perjury where the judgment of acquittal relied on, in support of the doctrine, was rendered in the very case where the alleged perjury is claimed to have occurred. In doing so we have pointed out that the instant case is not of such a character, the judgment in the first municipal court trial is not the one relied on by petitioner.

However, there is respectable authority to the contrary of the doctrine announced by respondent court.

> "If the accused was acquitted of the prior charge, as the excluded court records showed, the issue of guilt was conclusively settled against the government for every purpose, and could not again be drawn in question as a makeweight in another prosecution. A person acquitted of a crime cannot be again tried for it under the guise of a charge of perjury."
>
> *Chitwood v. United States* (C. C. A. 8) 178 Fed. 442;
>
> *United States v. Butler,* (D. C.) 38 Fed. 498.

Where the issue of truth or falsity has been determined in a trial intervening between the one in which the perjury is alleged to have occurred and the trial for such perjury, the doctrine of *res judicata* applies in all its force. Such was the holding in

Commonwealth v. Spivey, (Ky.) 48 S. W. (2d) 1076.

We submit that in depriving petitioner of the benefit of the doctrine of *res judicata* he was deprived of a right guaranteed to him under the Fourteenth Amendment.

No question is involved as to whether the facts disclosed by the record at the second municipal court trial were sufficient to support a plea of *res judicata*. This stands admitted by the record. Respondent court avoided the operation of the doctrine by holding it inapplicable to perjury prosecutions. This results in an unequal application of the law.

III.

CONCLUSION.

It follows that petitioner was convicted solely as the result of his being denied rights guaranteed to him under the Fourteenth Amendment. He was denied both due process of law and the equal protection and

operation of the laws. This being so his conviction was void.

Respectfully submitted,

LEO R. FRIEDMAN,
Attorney for Petitioner.

Dated: San Francisco,
August 21, 1941.

FILED
SEP 20 1941
CHARLES ELMORE CROPLEY
CLERK

(2)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 542

N. S. HOUSMAN,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT.

EARL WARREN,
Attorney General of the State of California,
DAVID K. LENER,
Deputy Attorney General of the State of California,
600 State Building, San Francisco, California,
Attorneys for Respondent.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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BRIEF FOR RESPONDENT.

STATEMENT OF CASE.

The statement of the case set forth by petitioner in his petition is fairly accurate. Some further detail, however, may be essential to bring to this Court a clearer conception of the issues presented. In line with the suggestion of petitioner, the Municipal Court complaints No. 425,409 and No. 425,410 will be hereafter referred to as the "first Municipal Court trial", while the Municipal Court case No. 425,187 will be hereafter

(NOTE): Unless otherwise indicated, all italics are by the writer.

referred to as the "second Municipal Court trial" as will the alleged narcotic records of petitioner involved herein be referred to as the "Black card" and the "Brandon card".

The first Municipal Court trial involved two narcotic prescriptions. Complaint No. 425,409 alleged the failure of petitioner to keep a record of a narcotic prescription issued to A. E. Black on the 23rd day of July, 1939, in accordance with Section 1-d of the California Narcotic Act. (California Statutes of 1933, pages 781, 784.) Complaint No. 425,410 alleged the failure of petitioner to keep a record of a narcotic prescription issued to A. R. Brandon on August 16, 1939 in violation of said section of the California Narcotic Act. These causes were consolidated for trial.

To rebut the evidence introduced in support of the offenses set forth in the first Municipal Court trial petitioner introduced the Black card and the Brandon card upon which entries of these prescriptions appeared with numerous others, as photolithographic copies of these cards attached to the indictment returned in the instant case will show. (R. 8A, 14A.)

In the trial of the first Municipal Court case petitioner took the stand and testified that the entries on the Black and Brandon cards, including those set forth in the complaint, were entered by him at or about the time they bear date. Neither of the prescriptions described in the complaints in the first Municipal Court trial are contained in the thirty counts of the complaint filed in the second Municipal Court trial, nor do the twenty-five of the thirty narcotic prescriptions

set forth in the complaint in the second Municipal Court trial, issued to Black and Brandon, exhaust the narcotic prescriptions set forth on the Black and Brandon cards. During the second Municipal Court trial petitioner again introduced in the evidence the Black and Brandon cards and again testified the entries made on said cards were made at or about the time they bear date. Petitioner was acquitted on both charges in the first Municipal Court trial and on all but three of the thirty counts involved in the second Municipal Court trial. The convictions returned by the jury in that case did not involve any of the narcotic prescriptions issued to Black or Brandon appearing on said cards. On November 9, 1939 the indictment for perjury, the offering of false evidence and the preparing of false evidence, in the instant case, was filed, based upon the testimony of the petitioner in the first Municipal Court trial.

It is contended by petitioner that the verity of the Black and Brandon cards was placed directly in issue in the second Municipal Court trial and that the verdicts of acquittal by the jury on the charges in the complaint involving the Black and Brandon narcotic prescriptions constituted a finding by the jury that the Black and Brandon cards were not false, fabricated or antedated and that the doctrine of *res judicata* as embodied in sections 1908 and 1911 of the California Code of Civil Procedure, and under the general rule of law, applied to criminal cases, including the offense of perjury.

The California Narcotic Act, under which the Municipal Court complaints were filed, was clarified and

codified without substantial change in the California Health and Safety Code. The compiling of this code was a part of a general plan on the part of the legislature to clarify and codify the laws of the State. As instances of the fulfillment of this legislative plan, we have among others, the Business and Professions Code, Insurance Code, Labor Code, Political Code, Civil Code and Code of Civil Procedure, all containing similar saving clauses with that under consideration herein. (See *Sobey v. Malony*, 40 Cal. (2nd) 381, 386.)

Section 1-d of the California Narcotic Act, as amended in 1933, and prior to its reenactment and codification in the Health and Safety Code, reads as follows:

> "Every person authorized by law to issue a prescription or administer or dispense narcotic drugs as mentioned in this act shall preserve for a period of not less than two years a record of the name and address of the person to whom, the date when, the character and quantity of the drug prescribed, or administered or dispensed, and the purpose for which each prescription was issued, or narcotic drug administered or prescribed or dispensed. Such record shall be open at all times to inspection by the inspectors of the Division of Narcotic Enforcement. In any prosecution under this act proof that the defendant had in his possession at any time a greater amount of drugs than accounted for by the record required in this act shall constitute prima facie evidence of guilt."
>
> (Statutes of California, 1933, Section 1-d, p. 784; Deering's General Laws, Act 5323, Section 1-d, p. 2604.)

This section, as reenacted and codified in the Health and Safety Code, was split up into two sections which provide:

> "Sec. 11225. Every person who isues a prescription, or administers or dispenses a narcotic shall make a record that, as to the transaction, shows all of the following:
>
> (a) The name and address of the patient.
>
> (b) The date.
>
> (c) The character and quantity of narcotics involved.
>
> (d) The pathology and purpose for which the prescription is issued, or the narcotic administered, prescribed, or dispensed."
>
> "Sec. 11226. The record shall be preserved for two years and shall at all times be open to inspection by inspectors of the State division and inspectors of the Board of Pharmacy.
>
> Every person who violates any provision of this section is guilty of a misdemeanor."
>
> (California Statutes of 1939, page 761.)

Section 4 of the Health and Safety Code is the saving clause assailed by petitoiner. It reads:

> "Any action or proceeding commenced before this code takes effect, and any right accrued, is not affected by this code, but all procedure thereafter taken therein shall conform to the provisions of this code as far as possible."
>
> (California Statutes of 1939, page 483.)

While section 2 of said Code provides:

> "The provisions of this code in so far as they are substantially the same as existing statutory

provisions relating to the same subject matter shall be construed as restatements and continuations, and not as new enactments."

(California Statutes of 1939, page 483.)

In order to ascertain the intention of the legislature, section 2 and section 4 of said Health and Safety Code must be read together. Section 2 is simply a reaffirmation of the general rule of statutory construction to the effect that when an existing statute is reenacted without substantial change it is the intention of the legislature to continue the old statute in full force and effect without interruption.

Petitioner contends the saving clause as evidenced by section 4 of the Health and Safety Code failed to save for prosecution offenses against said section 1-d of the Narcotic Act where no accusation had been filed prior to its alleged repeal, hence it was unconstitutional and ineffective against petitioner in the instant case.

JURISDICTIONAL GROUNDS ASSIGNED.

The grounds upon which petitioner seeks to invoke the jurisdiction of this Court are substantially as follows:

(a) That the refusal of the State court to apply the doctrine of *res judicata* in the instant perjury case constituted an invasion of the rights of petitioner guaranteed under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Federal Constitution.

(b) That the State court's holding that section 4 of the Health and Safety Code was valid as a saving clause for the prosecution of actions pending under section 1-d of the State Narcotic Act, after its repeal, constituted a violation of the "due process" and "equal protection" clauses of the Fourteenth Amendment in that section 4 imposes an unreasonable and arbitrary classification by granting immunity to those against whom no accusation had been filed for violations of said section 1-d of the Narcotic Act; that the State court failed to pass upon this constitutional question.

It is the contention of respondent that neither the application of the doctrine of *res judicata* nor the construction placed upon the saving clause in question by the State Appellate Court presents a federal question under and by force of which this Court may acquire jurisdiction; that the decision of the State Appellate Court is not subject to review by this Court because the decision is based upon the application of the local common law, or statutes which restate the common law, which does not involve a federal statute nor the federal Constitution.

ARGUMENT.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THE PETITION OF THE PETITIONER, HENCE THIS COURT HAS NO JURISDICTION TO REVIEW THE DECISION OF THE STATE APPELLATE COURT.

(a) THE DOCTRINE OF RES JUDICATA, BY THE GREAT WEIGHT OF AUTHORITY, HAS NO APPLICATION TO PERJURY CASES.

The great weight of authority holds that an acquittal of a defendant charged with the commission of a criminal offense is no bar to his subsequent prosecution for perjury, for falsely testifying at the former trial, by which he secured, or aided in securing, his acquittal, although his conviction on the perjury charge would necessarily be inconsistent with the verdict of acquittal in the former trial. In taking this view, the State Appellate Court in the instant case but followed the weight of common law authority and which appeared to be the best reasoned, the most logical and one which comports with our views of the administration of justice. The State Appellate Court in this connection quoted with approval from the leading cases of *People v. Niles* (Ill.), 133 N.E. 352, and *Jay v. State* (Ala.), 37 So. 137, as follows:

> "Though there is some conflict in the authorities upon the question of whether the doctrine of *res judicata* applies in a criminal proceeding of this nature the great weight of authority is that it has no application. One of the leading cases adopting the majority view is People v. Niles, 300 Ill. 458 (133 N.E. 252, 37 A. L. R. 1284). In that case the appellant had been indicted jointly with another for the larceny of and receiving as stolen property an automobile. The codefendant pleaded guilty and upon his favorable testimony and that

of the appellant the latter was found not guilty. Thereafter he was indicted for perjury because of the testimony so given. On appeal the Supreme Court of Illinois said that the question presented for decision was: 'Can a person acquitted by a jury of an offense of which he denied his guilt as a witness in his own behalf be afterwards prosecuted for perjury predicated upon testimony given by him upon the former trial, where a conviction of the charge of perjury necessarily imports a contradiction of the verdict of not guilty in the former trial?' In answering the question in the affirmative the court said: 'Justice cannot be administered through a system of courts unless there can be some assurance that the finding of the court is based upon testimony truthfully given. Any rule which tends to encourage the giving of false testimony threatens the peaceable and commendable settlement of controversies by the courts. The general proposition that one can escape punishment for perjury because he succeeded in inducing a jury to credit his false testimony is supported neither by authority nor by reason. If he could, then it follows that the law encourages parties—particularly defendants in criminal cases—to perjure themselves. We must declare that the law is guilty of no such folly. An accused's immunity from punishment for crime must not be made to depend upon the accomplishment of his acquittal in one prosecution by committing the crime for which he claims immunity. It is furthermore the policy of the law that judicial proceedings and judgments shall be fair and free from fraud, and that litigants and parties be encouraged, when sworn as witnesses, to tell the truth, and that they be punished if they do not. The

authorities seem now to be unanimous in holding that an acquittal of one charged with crime is no bar to a prosecution for perjury for false testimony given by him at the trial. (Citing numerous cases.)'

In *Jay v. State,* 15 Ala. App. 255 (37 So. 137, 139), the Alabama court clearly states the reason for the majority rule in the following language: 'The doctrine of *res judicata* springs out of and is founded upon the principle of estoppel. It rests upon the principle of public policy that there should be an end to litigation—the maxim is, "*Interest reipublicae ut sit finis litium.*" Keeping in view the basic principle and underlying reason—public policy—it is obvious that while public policy on the one hand demands an end of litigation, and hence puts forward the doctrine of *res judicata,* yet, on the other, it is manifest that every interest of public policy demands that perjury be not shielded by artificial refinements and narrow technicalities, for perjury strikes at the very administration of the law and holds the courts up to contempt if they allow the perjurer to go unwhipt of justice. In other words, while public policy on the one hand creates the doctrine of *res judicata,* it also, on the other, requires that perjurers be brought to trial. It would be a monstrous doctrine to hold that a person could go into a court of justice and by perjured testimony secure an acquittal, and because acquitted he could not be tried for his perjury; this would be putting a premium upon perjury and allowing a scoundrel to take advantage of his own wrong. Public policy does not quaranty immunity to criminals, and that is just what we are asked to do in extending the doctrine of *res judicata* to perjury.'

It would serve no purpose to cite further cases in support of the majority rule or to attempt to analyze those cited by appellant from the minority. Reference may be had to 37 A.L.R. 1290 et seq., 15 Am. Jur., p. 45."

(*People v. Housman,* 44 A.C.A. 687, 691; R. 87, 94.)

In *State v. Bissell* (Vt.), 170 Atl. 102, at page 106, the Court said:

"The courts are now almost unanimous in holding that an acquittal of one charged with crime is no bar to any perjury committed at the former trial. Note, 37 A. L. R. 1290. And it has been held that the same rule applies *although a conviction would necessarily import a contradiction of the verdict in the former case.* People v. Niles, 300 Ill. 458, 133 N.E. 252, 37 A. L. R. 1284."

See also:

State v. Archuleta (N. M.), 217 Pac. 619, 37 A. L. R. 1292;
State v. Vandemark (Conn.), 58 Atl. 715;
State v. Bingham (Kan.), 257 Pac. 951;
State v. Sargood (Vt.), 68 Atl. 49;
State v. Williams (Kan.), 58 Pac. 476;
Yarbrough v. State (Fla.), 83 So. 873;
State v. Tedder (Mo.), 242 S.W. 889;
Miles v. State (Tex.), 165 S.W. 567;
Hutcheson v. State (Tex.), 24 S.W. 908;
Murff v. State (Tex.), 172 S.W. 238;
State v. Cary (Ind.), 65 N.E. 527;
Teague v. Commonwealth (Ky.), 189 S.W. 908.

(b) THERE IS NO IDENTITY OF ISSUES IN THE SECOND MUNICIPAL COURT TRIAL AND THE CASE AT BAR.

It is argued that the acquittal of petitioner in the second Municipal Court trial was a finding by the jury that the Black and Brandon cards were not false, fabricated or antedated.

If this contention be sound, then the objection of petitioner should be that he is being placed twice in jeopardy, the only constitutional safeguard open to him. However, neither the rule of twice in jeopardy nor the doctrine of *res judicata* are available to him since the offenses charged and issued presented are not the same. In the second Municipal Court trial the issue was whether petitioner kept a record of his narcotic prescriptions, alleged in the complaint as required by the California Narcotic Act, while in the case at bar the issue was whether he gave false testimony in testifying the entries on the cards were made at or about the time they bear date. The proof of each offense requires a different character and quantum of evidence. Circumstantial evidence alone is sufficient to convict as to the offenses in violation of the California Narcotic Act, while to prove perjury it requires direct evidence such as the testimony of two witnesses, or one witness and corroborating circumstances. See *California Penal Code,* section 1103a. In this connection, the State court in the instant case said at page 690: (R. 89)

> "The appellant contends that the issue of the verity of the records was adjudicated in the former municipal court trial and that the state is therefore estopped from prosecution under the charges in the indictment. The respondent replies

that the charges there made related to the defendant's failure to keep records required by the State Narcotic Act, and that in finding the defendant not guilty of those charges it was not necessary for the jury to pass upon the truth or falsity of his testimony; that the jury may have disbelieved the testimony of the narcotic officers and may have acquitted the defendant for that reason; that it may have believed that the defendant was unjustly prosecuted because of the pending civil litigation involving the same subject matter. The theory that when a jury acquits a defendant in a criminal proceeding it thereby finds to be true the testimony of all witnesses called upon his behalf is not supported by reason or the common knowledge of mankind."

Again, on page 692: (R. 91)

"For the reason that the judgments in the second municipal court trial were not prior adjudications of the issues here involved the trial court did not err in denying appellant's motion to exclude all evidence relating to the verity of the cards or case records nor in refusing to strike such evidence from the record, and no error occurred in the rejection of appellant's offer in evidence of the judgment roll, transcript of testimony, or the court instructions to the jury in the two municipal court trials since all these documents were offered solely in support of appellant's plea of *res judicata* which was not sound. Appellant does not contend that any matter thus offered and rejected was material to any other item of his defense or that except as to his plea of *res judicata* he suffered any prejudice through the order rejecting his offer."

In *People v. Hardy* (Colo.), 174 Pac. 1117, it was held:

> "The question is this: Does the verdict in favor of the defendant conclusively establish that the testimony of defendant on the trial for forgery is true, and so bar further inquiry on that point? While the cases on the question are somewhat in conflict, we think the great weight of authority and by far the better reasoning answer the question in the negative. *The plea shows that there was evidence offered on behalf of defendant other than his testimony, and that being so, it cannot be said that all his testimony was determined to be true. Again the issue is not the same. In the one case it was: Did he commit such acts as amount to forgery in law? In the other it is: Did he wilfully testify falsely to a material fact?*"

See

State v. Bevill (Kans.), 100 Pac. 476;
State v. Archuleta, supra.

In *Yarbrough v. State* (Fla.), 83 So. 873, at page 874, it was said:

> "The crimes of larceny and perjury are separate and distinct offenses, and in acquitting plaintiff in error upon the charge of larceny the jury did not and could not also acquit him of any perjury which he may have committed in giving evidence in the case in defense of the larceny charge upon which he was on trial."

If the contention of the petitioner may be supported on the theory advanced by him, then the same argument with equal force and reason may be advanced in all cases where a charge of perjury is based upon the

false testimony of the defendant in a prior case in which he was acquitted. Indeed, this spurious defense has been advanced in the foregoing cases in which the Court refused to apply the doctrine.

(c) THE REFUSAL OF THE STATE COURT TO APPLY THE DOCTRINE OF RES JUDICATA VIOLATED NO FEDERAL CONSTITUTIONAL GUARANTEE.

The doctrine of *res judicata* rests upon the two maxims that "a man should not be twice vexed for the same cause" and that "it is for the public good there be an end of litigation".

Gill v. Peppin, 41 Cal. App. 487, 490.

It is simply a rule of public policy subject to the maxim of law that when the reason for the rule ceases, the rule itself ceases to exist. In this connection it was said in *Jay v. State* (Ala.), 73 So. 137, at page 139:

> "* * * In other words, while public policy, on the one hand, creates the doctrine of res judicata, it also, on the other, requires that perjurers be brought to trial. It would be a monstrous doctrine to hold that a person could go into a court of justice and by perjured testimony secure an acquittal, and because acquitted he could not be tried for his perjury; this would be putting a premium upon perjury and allowing a scoundrel to take advantage of his own wrong. Public policy does not guarantee immunity to criminals, and that is just what we are asked to do in extending the doctrine of res judicata to perjury. *It is a maxim of the law that when the reason ceases the law ceases,—'cessante ratione legis, cessat et ipsa lex.'*"

The doctrine has no application even in civil cases where a judgment has been secured through fraud. Thus, in *Edmonds v. Glenn-Colusa Irr. Dist.*, 217 Cal. 436, on page 439:

> "The doctrine of *res judicata* is stated in a very carefully considered definition in 15 Ruling Case Law, pages 950, 951, in the following language:
>
> 'Briefly stated, this doctrine is that an existing final judgment or decree rendered upon the merits, *and without fraud or collusion,* by a court of competent jurisdiction, upon a matter within its jurisdiction, is conclusive of the rights of the parties or their privies, in all other actions or suits in the same or any other judicial tribunal of concurrent jurisdiction, on the points and matters in issue in the first suit.' * * *"

Indeed, in California the doctrine in criminal cases, other than those in which the charge is perjury, has received a limited application. In this regard in *People v. Ashrawy,* 130 Cal. App. 145, at pages 149 and 150, it was said:

> "While it is true in regard to a judgment in a civil action that it 'is final and conclusive not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to, or essentially connected with, the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense' (Estate of Bell, 153 Cal. 331, 340 (95 Pac. 372, 376)), we do not think the rule applies to the same extent in a criminal action. *We think the rule there should be limited to matters actually submitted*

to the jury for its determination; otherwise we would, as in the instant case, bind the state, by successful subornation of perjury, where the same issue might have been but was not presented to the jury because of such criminal act. Such a conclusion is unthinkable under the facts of the two cases here involved."

It thus appears from this case that the issue of perjury must be directly submitted to the jury in order to apply the doctrine.

Section 1908 of the Code of Civil Procedure to which petitioner refers as embodying the doctrine of *res judicata,* is merely declaratory of the common law.

Atchison T. & S. F. Ry. Co. v. Nelson, 220 Fed. 53, 55;

Bartlett Hayward Co. v. Ind. Acc. Comm., 203 Cal. 522, 535.

Sections 1908 and 1911 of the Code of Civil Procedure involve civil law. At least no authorities have been cited by petitioner to the contrary. If they may be deemed applicable to criminal law, they contain no provision against the limitation imposed by the State court and of course whatever limitation is imposed involves a question of construction which is binding upon this Court.

From the foregoing it would clearly appear that the application of the doctrine presents no federal question. On the contrary it involves simply the application of a rule of common law locally applied which is recognized and adopted by the great weight of authority throughout the States of the Union. It re-

quires neither reason nor authority to point out under the circumstances the soundness of the rule applied by the State court. We have yet to learn in what manner and to what extent petitioner is denied the equal protection of the laws or due process of law under the Fourteenth Amendment in the Court's refusal to apply the doctrine in the instant case.

In *Whitney v. California,* 274 U. S. 357, at page 360, it was said:

> "It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. *Crowell v. Randell,* 10 Pet. 368, 392; *Railroad Co. v. Rock,* 4 Wall. 177, 180; *California Powder Works v. Davis,* 151 U.S. 389, 393; *Cincinnati, etc. Railway v. Slade,* 216 U.S. 78, 83; *Hiawassee Power Co. v. Carolina-Tenn. Co.,* 252 U.S. 341, 343; *New York v. Kleinert,* 268 U.S. 646, 650."

Again, in *Honeyman v. Hanan,* 300 U.S. 14, at page 18, it was said:

> "Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. *Lynch v. New York ex rel. Pierson,* 293 U.S. 52, 54, and cases

there cited. Whether these requirements have been met is itself a federal question. As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record. * * *"

See also:

Erie R.R. v. Tompkins, 304 U.S. 64;
Palmer v. Ohio, 248 U.S. 32, 34;
McCoy v. Shaw, 277 U.S. 302, 303.

(d) THE SAVING CLAUSE CONTAINED IN THE CALIFORNIA HEALTH AND SAFETY CODE AS APPLIED BY THE STATE COURT INVOLVED NO CONSTITUTIONAL GUARANTEE.

It is argued by petitioner that section 1-d of the California Narcotic Act was repealed on September 19, 1939 and that upon said day all violations thereunder ceased to be the subject of prosecution thereafter, in the absence of a valid saving clause. He points out the perjury charge is based upon the first Municipal Court trial, the trial of which did not start until after September 19, 1939, the effective date of said repeal, and that said saving clause violates the equal protection of law clause of the Fourteenth Amendment, since the right of prosecution was reserved therein only against those against whom an accusation had been filed prior to said repeal; that it grants immunity to those who violated the Narcotic Act before repeal but against whom no accusation had been filed prior to said repeal. The State Appellate

Court in the case at bar answered this contention as follows:

> "The appellant next complains that because of the repeal of the State Narcotic Act effective September 19, 1939, his trial in the municipal court occurring after that date was a nullity and that he could not therefore be tried for perjury committed during the course of the former trial. He bases his argument on the contention that when the legislature adopted the Health and Safety Code effective September 19, 1939 (Stats. 1939, p. 483), it failed to provide a saving clause covering offenses committed under the former act. In this the appellant is in error. Section 2 of the Health and Safety Code reads as follows: 'The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations, and not as new enactments.' Section 4 reads as follows: 'Any action or proceeding commenced before this code takes effect, and any right accrued, is not affected by this code, but all procedure thereafter taken therein shall conform to the provisions of this code as far as possible.' If this language is insufficient to disclose the legislative intent to effect a mere codification and clarification of the existing statutes without affecting the rights and obligations under those statutes, that legislative intent must be inferred from the fact that in reference to the subject matter here involved the new statute was a mere restatement of the provisions of the former. This subject is fully discussed in the recent opinion of Sobey v. Molony, 40 Cal. App. (2d) 381 (104 Pac. (2d) 868), in which numerous cases are cited. But the

appellant argues that section 4 of the Health and Safety Code is unconstitutional because perchance one might have violated the provisions of the State Narcotic Act prior to the effective date of the codifying act with no proceedings taken against him before that date, and hence the section would discriminate favorably to him and against those in the same position as to whom proceedings had been commenced before that date. We need not discuss this question in its constitutional phases as the section could be disregarded entirely and the same result would follow because of the settled rule that, independent of the saving clause, a person may lawfully be prosecuted under a reenacted or codified statute for a crime committed prior to the date of the codification. (*Sobey v. Molony,* supra.)"

If it may be assumed that the construction placed upon the saving clause by the State court was necessary to support the decision, still no construction has been placed upon it which would exclude from prosecution those who violated section 1-d of the State Narcotic Act prior to its alleged repeal and against whom no accusation had then been filed. In the absence at least of a construction which would hold the person last mentioned immune from prosecution, no federal question is presented. As far as the decision in the instant case is concerned, this Court would be obliged to speculate as to what construction the State court would place upon the saving clause in the event it had before it the question to decide. This Court cannot assume in advance that a construction of the

saving clause would be adopted which would render it obnoxious to the Federal Constitution.

Utah Power and Light Co. v. Pfost, 286 U.S. 165.

However, the point has been raised and decided in California in a case involving a saving clause substantially similar to that here under consideration. In *Sobey v. Molony,* 40 Cal. App. (2nd) 381, a physician was charged with a number of violations of the old Medical Practice Act, which, in line with the plan of the legislature heretofore mentioned was codified and restated in the Business and Professions Code. The offenses were committed prior to the repeal of the Medical Practice Act but no accusation prior to said alleged repeal had been filed against the defendant in that case. Thus we have a case petitioner claims is immune from prosecution under the saving clause here under dispute.

In *Sobey v. Molony,* supra, the State Appellate Court held that the saving clause in the Business and Professions Code saved for prosecution violations against the old Medical Practice Act where no accusation had been filed prior to its repeal. On pages 387 and 388 that Court in this connection said:

> "The effect of respondent's argument is this: He concedes that, if the Business and Professions Code contained no saving clause or clauses at all, he could be prosecuted for offenses committed prior to the adoption of that code; he further must concede that if section 2 were the only saving clause that the Board could lawfully prosecute him; but, according to his view, by enumerating

pending actions and rights accrued in sections 4 and 2002 it must be presumed that the legislature intended to remit all offenses committed prior to August, 1937, where prosecutions had not been instituted prior to that date. In other words, the sole purpose of sections 4 and 2002, according to respondent, was to remit offenses not being prosecuted at the time of the adoption of the new law. This would be to attribute to the legislature the intent of doing by indirection what it easily could have done directly. It is a most peculiar way to remit offenses by a provision specifically saving certain other offenses. Moreover, in attempting to ascertain the legislative intent, it must be kept in mind that statutes regulating the practice of professions and providing for the discipline of offending members, while penal in nature, are also intended to protect the public from unscrupulous, careless or dishonest practitioners. The legislature, we must assume, unless a different intent is clearly expressed to the contrary, did not intend by the codification of the law relating to medical practice, to benefit offending doctors at the expense of the general public. Yet this would be the result if it should be held that by the codification of the law, with the simultaneous repeal of the old law, doctors were placed beyond prosecution for acts constituting grounds for revocation of license both under the former and existing law. Fortunately, neither reason nor authority calls for such a strained construction."

On pages 390 and 391 the Court continues:

"It is our duty in this proceeding to attempt to ascertain and to give effect to the intent of the legislature. In attempting to arrive at that intent

> we are required to give effect, if possible, to all of the provisions of the law. To adopt respondent's construction of the clauses would be to disregard section 2, to treat sections 4 and 2002 as repugnant to section 2, and to hold sections 4 and 2002 controlling as special statutes over the general one. The construction we have adopted gives full effect to both clauses. Moreover, the construction adopted herein is not only a reasonable one, but it also attributes to the legislature a desire and intent to adopt laws in the public interest. We cannot believe that the legislature was so solicitous of doctors who had violated their responsibilities to the public and who had been false to their trust, that it intended to abrogate all prosecutions for offenses committed prior to the codification of the law. It is much more reasonable to assume that no such intent existed."

A petition for a hearing in the Supreme Court was denied.

As previously indicated, the saving clause contained in the Business and Professions Code is similar to that in the Health and Safety Code. The construction, therefore, of the saving clause here in dispute has been settled by the law of this State to include the saving of all offenses against the California Narcotic Act prior to its repeal, whether accusations had been filed or not. Aside from the question as to whether the contention of petitioner, if true, would constitute any discrimination in violation of the equal protection of the laws clause in the Constitution, the case of *Sobey v. Molony* has settled the law on the construction to be placed on the saving clause here under consideration.

Palpably, under these circumstances, there is no violation of the equal protection of the laws clause in the Fourteenth Amendment. Indeed, no federal question is presented. The construction of a local statute is alone involved, which in no manner offends the Constitution.

In *Erie R. R. Co. v. Tompkins,* 304 U.S. 64, at page 78, this Court said:

> "Third. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. * * *".

See also:

Guaranty Trust Co. v. Blodgett, 287 U.S. 509;
Sutter Buttes Canal Co. v. Railroad Commission, 279 U.S. 145;
Roe v. Kansas, 278 U.S. 191, 193.

(c) THE DECISION OF THE STATE COURT IS SUPPORTABLE BY THE APPLICATION OF THE GENERAL RULE OF CONSTRUCTION INDEPENDENT OF THE SAVING CLAUSE IN THE HEALTH AND SAFETY CODE.

A review of the decision of the State court heretofore quoted will show that it is supportable under

the general rule of construction without resort to the statutory saving clause. The same general rule of construction is recognized in *Sobey v. Molony,* supra, at page 385:

> "* * * It is well-settled that, independently of a saving clause, a person may lawfully be prosecuted, under a repealed and re-enacted statute, for a crime committed prior to the date of the re-enactment. (Lewis' Sutherland Statutory Construction, 2d ed., vol. 1, p. 445, sec. 238; Black on Interpretation of Laws, 2d ed., p. 421, secs. 124, 125; *State v. Gumber,* 37 Wis. 298; *State v. Ware,* 79 Or. 367 (154 Pac. 905, 155 Pac. 364); *State v. Wish,* 15 Neb. 448 (19 N.W. 686); *Bauer v. State,* 99 Neb. 747 (157 N.W. 968); *State v. Brewer,* 22 La. Ann. 273; *Borough of Langhorne Manor v. Clayton,* 129 Pa. Super. 557 (196 Atl. 584); see also, *Board of Dental Examiners v. Lazzell,* 172 Md. 314 (191 Atl. 240).)"

In order to give this Court jurisdiction it must affirmatively appear from the record not only that a federal question was presented but that the decision of the federal question is necessary to the determination of the case.

Honeyman v. Hanan, supra;
Lynch v. New York, 293 U.S. 52.

(f) THE REENACTMENT OF SECTION 1-d OF THE CALIFORNIA NARCOTIC ACT INTO SECTIONS 11225 AND 11226 OF THE HEALTH AND SAFETY CODE WAS WITHOUT SUBSTANTIAL CHANGE AND WAS BUT A RESTATEMENT AND CONTINUATION OF THE CALIFORNIA NARCOTIC ACT.

It is argued that there is no provision in the Health and Safety Code substantially the same as section 1-d

of the California Narcotic Act. It is said a new element is added by the Health and Safety Code—the word "pathology". Bearing in mind the purpose of this narcotic legislation, the difference, if any, is trifling; section 1-d of the Narcotic Act as codified in the Health and Safety Code is substantially the same. The State Appellate Court in its decision so found, which is binding upon this Court under the authorities above cited. Moreover, it is difficult to understand how such a trifling difference, if any, could present to this Court a federal question.

It is submitted that the petition of petitioner presents no federal question giving this Court jurisdiction and that said petition should be denied.

Dated, San Francisco, California,
September 17, 1941.

Respectfully submitted,

EARL WARREN,
Attorney General of the State of California.

DAVID K. LENER,
Deputy Attorney General of the State of California.

Attorneys for Respondent.